

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8

9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 XIMPLEWARE CORP.,

No. C 13-05160 SI

12 Plaintiff,

**ORDER DENYING DEFENDANTS'
MOTION TO DISMISS**

13 v.

14 VERSATA SOFTWARE, INC.; TRILOGY
15 DEVELOPMENT GROUP, INC.;
16 AMERIPRISE FINANCIAL, INC.; and AUREA
SOFTWARE, INC.,

17 Defendants.
18 _____ /

19 Defendants Ameriprise Financial Inc. and Ameriprise Financial Services, Inc. (collectively,
20 “Ameriprise”), have filed a motion to dismiss plaintiff XimpleWare Corporation’s claims of copyright
21 infringement, unjust enrichment, unfair competition, and declaratory relief. Docket No. 52. The motion
22 is scheduled for hearing before the Court on February 7, 2014. Pursuant to Local Rule 7-1(b), the Court
23 determines that the matter is appropriate for resolution without oral argument and VACATES the
24 hearing. For the reasons set forth below, the Court DENIES defendants’ motion to dismiss.

25
26 **BACKGROUND**

27 XimpleWare develops, designs, and licenses software for data processing. Amended Complt.

28 ¶ 3. Zhengyu Zhang, a founder of XimpleWare, wrote the source code for XimpleWare’s Extensible

¹ Markup Language program (“XML”), which XimpleWare published in an online open source
² repository under a GNU General Public License (GPL). *Id.* ¶¶ 19-21, 26, 39.

In summer 2013, XimpleWare learned of a lawsuit brought by Versata Software Inc. against Ameriprise in Texas state court, alleging that Ameriprise materially breached Versata’s DCM software license. *Id.* ¶¶ 49, 50; Docket No. 14-5. On November 5, 2013, XimpleWare filed this suit against Versata and Ameriprise for copyright infringement, violation of the Lanham Act, breach of contract, breach of good faith and fair dealing, unjust enrichment, intentional interference with prospective economic advantage, unfair competition, and declaratory relief. Compl. Docket No. 1. The initial complaint was amended on December 17, 2013. Docket No. 48.

10 XimpleWare claims Versata is liable for copyright infringement because Versata incorporated
11 XimpleWare's VTD-XML into Versata's DCM software product and then commercially distributed the
12 Versata DCM product without obtaining a commercial license or permission for the use of
13 XimpleWare's products, or complying properly with the GPL license. Amended Compl. ¶¶ 55-58.
14 Additionally, XimpleWare alleges that Ameriprise distributed Versata's DCM and VTD-XML to
15 thousands of non-employee financial advisors, thereby violating the GPL.¹ *Id.* ¶¶ 60-61.

Now before the Court is defendant Ameriprise's motion to dismiss XimpleWare's four claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 7-2. Motion pg. 2.

LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts that add up to “more than a sheer possibility that a Defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of

¹ XimpleWare maintains Ameriprise made these outside distributions without any attribution to XimpleWare, without XimpleWare's copyright notice, without reference to XimpleWare's source code, and without any offer to convey the XimpleWare source code. Amended Compl. ¶ 61.

1 action will not do.”” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). “Nor does a complaint
2 suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting
3 *Twombly*, 550 U.S. at 557). “While legal conclusions can provide the framework of a complaint, they
4 must be supported by factual allegations.” *Id.*

5 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the
6 complaint, and draw all reasonable inferences in favor of the plaintiff. *See al-Kidd v. Ashcroft*, 580 F.3d
7 949, 956 (9th Cir. 2009). However, a district court is not required to accept as true “allegations that are
8 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec.*
9 *Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, “the tenet that a court must accept as true all of
10 the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.
11 In considering a motion to dismiss, the court may take judicial notice of matters of public record outside
12 the pleadings. *See MGIC Indemn. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). If the Court
13 dismisses a complaint, it must decide whether to grant leave to amend. The Ninth Circuit has
14 “repeatedly held that a district court should grant leave to amend even if no request to amend the
15 pleading was made, unless it determines that the pleading could not possibly be cured by the allegation
16 of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation
17 marks omitted).

DISCUSSION

1. Copyright Infringement

21 XimpleWare’s first claim against Ameriprise is for direct copyright infringement. According
22 to XimpleWare, Ameriprise purchased Versata’s products, which contained XimpleWare’s copyrighted
23 source code, and then distributed XimpleWare’s software without copyright notices or GPL licensing
24 information, in violation of the GPL. Opp. pg. 10. XimpleWare’s position is that Ameriprise did not
25 simply use the software, but also distributed and copied it without the requisite copyright notices of
26 licensing information, thereby acting outside the scope of the GPL.

27 Ameriprise argues that even assuming all of XimpleWare’s factual allegations to be true, the
28 allegations do not give rise to a claim for relief for copyright infringement because XimpleWare has not

1 made any allegations that Ameriprise copied, distributed, or modified the software to anyone but its own
2 financial advisors, so there is no allegation that Ameriprise used the software contrary to the terms of
3 the license. *Id.* at 7; Reply pg. 7. Ameriprise contends that even XimpleWare's allegations that the
4 financial advisors are actually independent contractors and not employees does not alter the fact that
5 the software was used only by Ameriprise personnel and was not sold or distributed to third parties.
6 Motion pg. 10.

7 "Generally, a copyright owner who grants a nonexclusive license to use his copyrighted material
8 waives his right to sue the licensee for copyright infringement and can sue only for breach of contract."
9 *Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (quoting *Sun Microsystems, Inc. v. Microsoft*
10 *Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999)) (internal quotation marks omitted). However, if the license
11 "is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright
12 infringement." *Id.*

13 XimpleWare's amended complaint clearly alleges that Ameriprise copied and distributed its
14 software. Amended Compl. ¶ 71. The amended complaint states: "Ameriprise purchased the Versata
15 Products containing XimpleWare's copyrighted Source Code and Product and without authorization,
16 reproduced and distributed that material both internally and outside of Ameriprise in violation of
17 XimpleWare's copyrights." XimpleWare further alleges "Ameriprise then, without authorization,
18 copied, reproduced, distributed, and re-implemented the Versata Products in their own systems as they
19 saw fit . . . Ameriprise made and distributed additional copies, without authorization, to its vendors in
20 India as part of its effort to replace the Versata product." Additionally, XimpleWare claims "Ameriprise
21 has distributed without authorization DCM and VTD-XML to thousands of non-employee independent
22 contractor or franchise advisors or 'producers.'" *Id.* ¶ 72. XimpleWare specifically alleges that "the
23 majority of Ameriprise financial advisors are not Ameriprise employees," and cites Ameriprise' 2012
24 Annual Report in support of its allegation that Ameriprise "distributed DCM and VTD-XML to these
25 thousands of non-employee financial advisors." *Id.* ¶¶ 59-60. XimpleWare's amended complaint states:
26 "According to its 2012 Annual Report, 'The support [Ameriprise] offers[s] to its franchisee advisors
27 includes generalist and specialist leadership support, technology platforms and tools, training and
28

1 marketing programs.’ On information and belief, DCM is among the ‘technology platforms and tools’
2 that Ameriprise provides to its outside advisors.” Amended Complt. ¶ 60.

3 Accepting as true the facts alleged in the amended complaint and drawing all reasonable
4 inferences in favor of XimpleWare, as it must, the Court finds that XimpleWare has alleged Ameriprise
5 reproduced and distributed the software outside of Ameriprise and to non-employees, thereby acting
6 outside the scope of the GPL. XimpleWare has therefore stated a claim of copyright infringement. The
7 Court DENIES defendants’ motion to dismiss plaintiff’s copyright claim.

8

9 **2. Additional Claims**

10 Ameriprise argues that XimpleWare’s claims for unjust enrichment, unfair competition, and
11 declaratory relief must all be dismissed because they are dependent upon XimpleWare’s copyright
12 infringement claim. Motion pgs. 12-13. Having found that XimpleWare’s allegations constitute a claim
13 for copyright infringement, the Court accordingly DENIES the defendants’ motion to dismiss
14 XimpleWare’s claims for unjust enrichment, unfair competition, and declaratory relief.

15

16 **IT IS SO ORDERED.**

17

18 Dated: February 4, 2014



19
20 SUSAN ILLSTON
21 UNITED STATES DISTRICT JUDGE
22
23
24
25
26
27
28